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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 231

231

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,

Petitioner,

—v—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court (R. 200-212) is reported at 73 F. Supp. 990. The opinions of the Circuit Court of Appeals (R. 223-227, 254-264) are reported at 168 F. (2d) 503.

Jurisdiction

The judgment of the Circuit Court of Appeals (R. 228) was entered on April 9, 1948. A petition for rehearing was filed by petitioner on April 20, 1948 (R. 229-241), and after

oral argument, the Circuit Court of Appeals adhered to its previous decision in an opinion rendered on June 2, 1948 (R. 254-256, 264). The petition for writ of certiorari was filed on August 17, 1948 and certiorari was granted on October 18, 1948. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Statutes and Other Material Involved

The Statutes and other material involved are set forth in the Appendix, pp. 33-36 *infra*.

Questions Presented

1. Whether petitioner's reenlistment in the Navy subjected him to the jurisdiction of the Navy to try him by Court Martial for an offense allegedly committed during a prior enlistment, at the termination of which he had received a discharge, when; in the absence of such reenlistment, the Navy would admittedly not have had jurisdiction to try petitioner for such alleged offense (R. 41, 126, 224, 225).

2. Whether the Naval Court Martial had jurisdiction to try petitioner for an offense allegedly committed during an enlistment which had expired, at the termination of which petitioner had received an honorable discharge. (R. 100-109, 126, 134-141).

Statement

Petitioner enlisted in the U. S. Navy under a minority enlistment on March 24, 1936 (R. 38). On reaching his majority on November 8, 1939, he extended his term of

enlistment for a period of two years (R. 39). On November 7, 1941, while stationed in the Philippine Islands, his enlistment expired and he was honorably discharged (R. 45). He reenlisted the same day for a period of four years (R. 46, 124). Through good conduct and proficiency in his duties, he attained promotions to higher rates, and on February 23, 1942, he secured his present rating of Chief Signalman (R. 124).

In May, 1942, after actively participating in the defense of Corregidor, petitioner was taken a prisoner of war of the Japanese and remained such till he was liberated in September, 1945 (R. 124). After extensive hospitalization, he was given a physical examination prior to discharge and on March 26, 1946, his enlistment having expired, he was given an honorable discharge (R. 41, 145). In the afternoon of March 27, 1946, petitioner reenlisted in the Navy for a period of four years (R. 42, 110).

On February 24, 1947, eleven months after reenlistment and 18 months after liberation as a prisoner of war, petitioner was served with charges and specifications, directing his trial before a General Court Martial, convened by the Commandant of the Third Naval District (R. 63, 134). The offenses as set forth were alleged to have been committed while the petitioner was a prisoner of war of the Japanese during his prior enlistment (R. 134-141).

During the trial before the Court Martial, petitioner made a plea in bar of trial on the grounds: (1) that the general court had no jurisdiction to try him for offenses allegedly committed while he was a prisoner of war, and, (2) that the general court martial had no jurisdiction over offenses allegedly committed during an enlistment which had expired and from which he had received an honorable discharge. This plea was denied (R. 103-105). On August 12, 1947, after trial, petitioner was acquitted of two charges

and seven specifications, but was convicted of the charge of maltreatment of a person subject to his orders, under Article 8 (second) of the Articles for the Government of the Navy (hereinafter referred to as "AGN") and of two specifications thereunder.[1] He was sentenced to ten months, reduced to apprentice seaman and given a dishonorable discharge from the U. S. Navy (R. 101).

On August 18, 1947, petitioner filed a petition for a writ of habeas corpus in the United States District Court of the Eastern District of New York (R. 7-12). The petitioner challenged the jurisdiction of the General Court Martial on two grounds: (1) that at the time of the alleged offenses, petitioner was not subject to AGN since he was a prisoner of war of the Japanese; and (2) that the alleged offenses had occurred during an enlistment from which the petitioner had received his honorable discharge and since the offenses did not come under Article 14, AGN, the jurisdiction of the General Court Martial never existed and could, therefore, not be revived by a subsequent reenlistment (R. 7-12). After argument, the District Court filed its opinion on September 26, 1947, over-ruling the first contention of the petitioner but sustaining the second (R. 200-212). On September 29, 1947, the petitioner was released from custody of the respondent (R. 27-29), and since that time has been on active duty with the U. S. Navy.

Respondent appealed to the Circuit Court of Appeals for the Second Circuit from the order of the District Court, by notice of appeal dated December 23, 1947 (R. 3, 4). Petitioner moved to dismiss the appeal under Rule 73 of the Rules of Civil Procedure, on the grounds that it had

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1. Each specification of which petitioner was convicted set forth separate assaults, *i.e.*, with closed fists on a fellow prisoner, subject to petitioner's orders.

not been taken within sixty days of the order of the District Court (R. 220, 221). This motion was denied by the Circuit Court of Appeals on January 12, 1948 (R. 222).

The cause was argued before the Circuit Court of Appeals on March 4, 1948 (R. 223). On April 9, 1948, the Circuit Court of Appeals reversed the order of the District Court with a written opinion (R. 223-228), and Circuit Judge Frank filed a dissenting opinion (R. 227). Petitioner filed a petition for a rehearing on April 20, 1948 (R. 229-241) and on May 7, 1948, respondent filed a memorandum in answer to this petition (R. 242-253).

The cause was again argued before the Court on May 13, 1948, and on June 2, 1948, said court adhered to its former judgment in a per curiam opinion and once again Circuit Judge Frank wrote a dissenting opinion after withdrawing his former dissent (R. 254-256-264). Thereafter, a writ of certiorari was submitted to this Honorable Court and on October 18, 1948, said writ of certiorari was granted.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that petitioner's reenlistment in the Navy revived the Navy's jurisdiction to try him for an offense allegedly committed during a prior enlistment.

2. The Circuit Court of Appeals erred in holding that the last two sentences of Section 334 (a), Naval Courts and Boards (1937 ed) constituted "instructions" and, accordingly, "regulations" within the meaning of Section 591 of Title 34 U. S. C. A.

3. The Court below erred in holding that petitioner agreed, under his contract of enlistment, to be bound by

the provisions of the last two sentences of Section 334 (a) of Naval Courts and Boards (1937 ed).

4. The Circuit Court of Appeals erred in accepting a recent administrative interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy revives the jurisdiction of the Navy over offenses committed in a prior enlistment.

5. The Circuit Court of Appeals erred in failing to accept a long settled interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy does not revive the jurisdiction of the Navy over offenses committed during a prior enlistment.

6. The Circuit Court of Appeals erred in holding that petitioner's honorable discharge from the Naval service at the expiration of his prior enlistment, did not extinguish his responsibility before Naval Court Martial for any offenses allegedly committed during that enlistment.

Summary of Argument

The Navy derives its court martial jurisdiction solely from the Articles for the Government of the Navy (herein called the "AGN"). Court martials, therefore, are courts of limited jurisdiction, the scope of their authority being explicitly regulated and limited by statute. Especially where, as here, the statutory tribunal exercises penal jurisdiction, the statute granting this jurisdiction must be strictly construed.

Neither Article 8, nor any other provision of the AGN, can be construed to extend court martial jurisdiction over Naval personnel for offenses committed in a previous en-

listment from which they have been discharged. While Article 8 provides for jurisdiction over "any person in the Navy", this plainly does not empower the Navy to try such persons for offenses *whenever committed*. Article 14 provides that in certain kinds of offenses (not involved here) the Navy shall retain jurisdiction even after discharge, thereby implying that this is not the case in other offenses.

Furthermore, the interpretation that such jurisdiction exists is inconsistent with the lack of jurisdiction over enlisted personnel in similar situations. Since the Army has interpreted the Articles of War as not granting jurisdiction over enlisted personnel for offenses committed in an earlier enlistment, a different rule would apply depending upon the branch of service which a person might join or into which he might be drafted. Further, the arbitrary result would obtain that while a person who remained a civilian or joined the Army after discharge from the Navy or a person who joined the Navy after discharge from the Army would not be subject to court martial for an offense committed in the earlier enlistment, this would not be so of a person who happened to serve and then reenlist in the Navy.

The assertion of such jurisdiction by the Navy, in decisions in several court martial cases and a reference to such decisions in Naval Courts and Boards, is not a determination which is in any sense binding upon this Court. The Navy is nowhere authorized to make determinations of the scope of its jurisdiction and it is familiar doctrine that the interpretation of statutory jurisdiction is a judicial and not an administrative function.

Further, insofar as the practical interpretation of a statute by the department charged with its enforcement has weight in determining the final judicial interpretation, the long standing interpretation by the Navy that jurisdic

tion did not exist in these cases argues for a similar judicial determination. These interpretations are not simply deductions from the failure to assert jurisdiction, but were in the form of positive declarations that no jurisdiction existed. Moreover, the failure of Congress to amend the AGN in the face of this long-standing interpretation and the action of Congress in reenacting without change the Articles of War, under which the same interpretation prevailed suggests Congressional approval of this interpretation.

The recent attempt by the Navy to repudiate these past interpretations by asserting jurisdiction over enlisted personnel for offenses committed in prior enlistments should not be viewed as at all persuasive. First, the change was inspired by the District Court opinion in *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.) This decision failed to give effect to the administrative rulings of the Army and was never accepted by the Army as compelling a change in the interpretation of its jurisdiction in situations like that here presented. Secondly, a departmental agency, no less than a court, is required to give great weight to a long line of consistent interpretations. An about face in interpretation after many years must surely rest on well-nigh irresistible grounds, let alone the insubstantial groundwork of this one suspect opinion, to warrant its judicial affirmation.

Reliance upon Section 334 (a) of Naval Courts and Boards as a regulation with the force of law to which the petitioner consented to be bound upon his enlistment is wholly unwarranted. The relevant provisions of Section 334 (a) are in no sense a "regulation" in the sense of an order or command. It is rather a summary of recent court-martial orders and the decision in *Ex parte Joly, supra.* It is, therefore, not a "regulation" to which petitioner con-

sented to be bound. Furthermore, insofar as that Section purports to extend court-martial jurisdiction beyond what is granted in the statute, it is invalid and, therefore, not binding upon petitioner whether or not he consented. It is fundamental that jurisdiction over the subject matter cannot be conferred by consent. Moreover, petitioner never did in fact consent to be bound by this Section which he had no occasion even to read; consent can be adduced only by a fiction.

Finally, the honorable discharge from the Navy received by petitioner upon the termination of his first enlistment constituted a final accounting with respect to the military service that had been terminated. *Ex parte Drainer*, 65 F. Supp. 410 (N. D. Cal.), aff'd sub nomine *Gould* v. *Drainer*, 158 F. (2d) 981 (C. C. A. 9); *United States* v. *Kelly*, 82 U. S. 34.

ARGUMENT

I

The Articles for the Government of the Navy should be construed by their terms to deny jurisdiction over petitioner to the naval court martial.

Strong considerations of public policy require a strict interpretation of the jurisdiction of naval courts martial under the AGN. Such courts have limited jurisdiction which is defined by Congress in the AGN. *Rosborough* v. *Rossell*, 150 F. (2d) 809 (C. C. A. 1). In a democratic society the scope of the authority of military tribunals involves fundamental civil liberties. The extension of that authority is *pari passu* an encroachment on the jurisdiction of civilian courts having all the safeguards of the common law. Since Article 8 of the AGN is a criminal statute, it

should be strictly construed on that ground. See *Rosborough* v. *Rossell, supra*, 150 F. (2d) at page 816.

The AGN do not confer upon the Navy any express power to try by court martial a person who has reenlisted in the Navy for an alleged offense committed during a prior enlistment. It is true that Article 8 of the AGN, under which petitioner was convicted, by its terms provides for jurisdiction over "any person in the Navy." But this broad provision is subject to limitations. For example, Article 8 surely does not apply to an offense committed by the accused while a civilian prior to his entry into the Naval service.[2] In the same way, Article 8 does not apply to an offense committed during a prior enlistment which has been terminated by an honorable discharge. Except for offenses under Article 14 of the AGN, there should be a concurrence of two factors to make an enlisted man subject to court martial under the AGN: (1) he must be in the Navy when the proceedings against him are commenced; and (2) the offense must have been committed during the enlistment current at the time of trial.

"Enlistment is a voluntary contract for military service for a certain term entered into by a civil person with the United States." Winthrop, Military Law and Precedents (1920) ed., page 538; *In re Grimley*, 137 U. S. 147; 6 Ops. Att'y. Gen. 190. One of the most important elements of the contract is the period of the enlistment, which is fixed by Congress. Winthrop, *op. cit. supra*, page 546, ft. nt. 75. At the present time "enlistments in the Navy may be for minority or terms of two, three, four, or six years . . . ". 34 U. S. C. 181. These short terms indicate an intention of Congress that the termination of an enlistment shall

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2. The contrary intimation in *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y., 1922), has never been accepted by the Navy or the Army.

mark the end of a chapter and that no incidents of the enlistment shall survive.

For many years the AGN have been construed to provide that a discharge or dismissal of an officer or enlisted man from the Naval Service terminates the jurisdiction of the Navy with respect to all offenses except those under Article 14, AGN. *United States* v. *MacDonald*, 265 Fed. 695 (E. D. N. Y.); *Ex parte Wilson*, 33 F. (2d) 214, (E. D. Va.); *Ex parte Drainer*, 65 F. Supp. 410, 411, (N. D. Cal.), aff'd *sub nomine Gould* v. *Drainer*, 158 F. (2d) 981 (C. C. A. 9th); 5 Ops. Att'y. Gen. 55, 58, 59; 8 Ops. Att'y. Gen. 328; 31 Ops. Att'y. Gen. 521; C. M. O. 1—1921, page 15. The same general rule, with a similar exception, prevails in the Army. See *Hironimus* v. *Durant*, 168 F. (2d) 288 (C. C. A. 4th). In Winthrop's Military Law and Precedents (1920 ed.) at page 93, the rule governing amenability to court martial jurisdiction after expiration of enlistment and discharge, when the proceedings have not commenced prior thereto, is stated:

> "Putting out of question the class of offenses, the amenability for which is expressly defined by the 60th Article, it is the opinion of the author that, *in separating, in any legal form, from the service an officer or soldier* or consenting to his separation therefrom *and remanding him to the civil status at which the military* jurisdiction properly terminated, the United States (while it may of course continue to hold him liable for a pecuniary deficit,) *must be deemed in law to waive the right to prosecute him before a court martial for an offense previously committed, but not brought to trial.* In this view, a subsequent reappointment or reenlistment into the army would not revive the jurisdiction for past offenses, but the same would

properly be considered as finally lapsed." (Italics ours)

The same rule appears at page 115 of volume I of Winthrop's work, 1886 edition and at page 124 of his volume of 1896. Laws Relating to the Navy, two volumes, the 1922 volume at page 870-874 and the 1929 supplement at page 179, is in accord.[3]

In the exceptional cases, where Congress has intended the jurisdiction to survive discharge from the service a specific provision has been made. Thus in Article 14 of the AGN, relating to frauds against the United States and similar offenses, the jurisdiction is expressly retained after the offender "receives his discharge, or is dismissed from the service." 34 U. S. C. §1200, Article 14 (Eleventh). Moreover, where the Secretary of the Navy extends the term of an enlistment in time of war or national emergency, the "laws and regulations for the government of the Navy" are made expressly applicable during such extension. 34 U. S. C. §181. Had Congress intended to confer jurisdiction over reenlisted men with respect to offenses during a prior enlistment, an express provision would have been made in the AGN.

Jurisdiction over reenlisted men with respect to offenses in a prior enlistment would involve a discrepancy in their treatment as compared with persons in similar situations. In the Army the rule has long prevailed, based on no express provision in the Articles of War, that reenlistment does not revive jurisdiction over offenses in a prior enlist-

3. The Circuit Court of Appeals concedes the general principle, but creates confusion by confining its statement of the principle, to cases of honorable discharge (R. 225). The jurisdiction is lost, under the AGN, by reason of separation from the service, even without honor. *Ex parte Wilson, supra*; Winthrop, *Op. Cit. supra*; p. 93.

ment. Manual for Courts-Martial U. S. Army (1928), page 8, §10; Dig. Op. JAG (1867-1912), page 515, §VIII 1 1b; Dig. Op. JAG (1912-1940), §369 (4). The construction of the AGN adopted by the Circuit Court of Appeals would result in differing rules for the Army and the Navy.

Neither those who served in the Army or the Navy and remain in civilian status after their discharge, nor those who enlist in the Army after having served in the Navy, nor those who enlist in the Navy after having served in the Army, may be tried by court martial for alleged offenses committed during their original period of service at any time following their discharge, (except for offenses under Article 14, AGN or the corresponding provision of the Articles of War). Under the decision of the Circuit Court of Appeals an exception is made in the case of those who serve in the Navy and reenlist in that branch of the service. In the absence of unequivocal language in the statute, it cannot be assumed that Congress intended such discrimination.

The Circuit Court of Appeals erred in accepting the analogy suggested by the respondent, namely, "that of a defendant who commits a crime in Canada, escapes to the United States, and then returns to Canada; he cannot defend on the ground that between the offense and the trial he was beyond the jurisdiction of the Canadian court." (R. 255). This example is anything but analogous for that person was a fugitive from justice and could have been extradited from the United States, whereas petitioner was never a fugitive from the Navy (he was honorably discharged), and if he had not reenlisted of his own volition, the Navy could not have recalled him to service, nor "extradite" him. He had completed his contract of enlistment.

If the analogy of the Circuit Court of Appeals were accepted, it would follow that persons who serve in the Navy and return to civilian life might well be subject to trial by court martial for offenses committed during such service if at any subsequent time they return to Naval jurisdiction. For under the analogy the statute of limitations would be tolled during the time that such persons were civilians and would commence to run again only upon their return to Naval jurisdictions. See: *In re Davidson* 4 Fed. 507 (S. D. N. Y.); *Ex parte Clark*, 271 Fed. 533 (S. D. N. Y.) Surely the AGN should not be construed to permit such a result.

II

Even if the provisions of the AGN were ambiguous the determination of the jurisdictional question by the Navy is not binding, since the Navy cannot finally determine its own jurisdiction.

We have already shown that the AGN should be construed, without reference to extraneous aids to its construction, to deny jurisdiction over reenlisted personnel with respect to offenses committed during a prior enlistment. The Circuit Court of Appeals rested its decision, however, on the Navy's recent administrative interpretations, which purport to uphold the jurisdiction (R. 255, 256). See GCM Rec. No. 75740 (Feb. 1, 1933) cited in Naval Courts and Boards (1923 ed.), §559, ft. nt. 4[4]; C. M. O. 7—1938, p. 42. See Naval Courts and Boards (1937 ed.) §334.

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4. This footnote was added after the original publication, presumably after February 1, 1933.

Naval courts martial, however, are tribunals of limited jurisdiction, deriving their powers exclusively from statutory grants of power. As courts of limited jurisdiction their authority is narrowly confined within the scope of the jurisdiction so conferred. See *Rosborough* v. *Rossell*, 150 F. (2d) 809, 816 (C. C. A. 1). The Navy is not vested by the AGN with any broad rule-making power to assert jurisdiction not explicitly conferred by that Statute. True it is that Section 591 of Title 34, U. S. Code, permits the Navy, with Presidential approval, to issue "orders, regulations and instructions." But as stated by the dissenting Judge below, neither this section nor any other statutory provision creates a power to enlarge the jurisdiction of a court martial. So much was conceded by respondent on oral argument in the Circuit Court of Appeals, and is, in fact, required by those authorities which hold that regulations under Section 591 of 34 U. S. Code must be consistent with the statutes relating to the Navy. See *United States* v. *Symonds*, 120 U. S. 46, 49; *Glavey* v. *United States*, 182 U. S. 585, 605-606. In the *Symonds* case this Court stated (120 U. S. at page 49): "The authority of the Secretary to issue orders, regulations and instructions with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress with reference to the Navy."

As stated in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369:

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

Much less can an executive department extend its statutory jurisdiction by regulation.

In the light of our policy "adverse to any unnecessary extension of the authority of military courts" (R. 260), the limits of the jurisdiction conferred by the AGN should be finally determined by the courts. In fixing those limits in the present case this Court should make the final determination without being bound by the recently changed administrative rulings of the Navy.

III

To the extent that administrative interpretations are considered in construing the AGN, the long established rulings denying the jurisdiction herein asserted should be accepted and the later contrary rulings should be rejected.

A. History of Naval Administrative Rulings.

For many years prior to 1933 the Navy had consistently interpreted the AGN as denying jurisdiction to try reenlisted Naval personnel for offenses committed in a prior enlistment terminated by discharge, except for offenses under Article 14, AGN (R. 249, 257). C. M. O. 22—1917, p. 7; C. M. O. 12—1921, p. 11; C. M. O. 1—1926, p. 9; C. M. O. 12—1929, p. 7; Laws Relating to the Navy, Ann. (1929 Supp.), p. 179. The rule of the Army, predicated on similar statutory provisions, has been for many years, and now is, to the same effect. Dig. Op. JAG (1867-1912), page 515, §VIII I, 1b; Manual for Courts-Martial U. S. Army

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5. We are unable to find any rulings prior to those cited. The AGN were first enacted in 1799. 1 Stat. 712 (1799). No amendment governing the present question has been adopted.

(1928), Par. 10; Dig. Op. JAG (1912-1940), §369 (4); Winthrop, Military Law and Precedents (1920 ed.) p. 93.

These interpretations by the Navy were set forth in authoritative decisions in court martial cases in which the highest law officers of the Navy, the Judge Advocates General, after consideration of the scope of the Navy's court martial jurisdiction, expressly held that there was an absence of jurisdiction over reenlisted personnel with respect to offenses in a prior enlistment. Typical of the positive affirmations that there was no power to act in such cases is the holding in C. M. O. 12—1929, p. 7:

> "Except in cases of offenses in violation of article 14 of the Articles for the Government of the Navy, *there is no authority of law giving jurisdiction* to a Court Martial to try an enlisted man for an offense committed in a prior enlistment from which he had an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such re-enlistment at the time the jurisdiction of the Court was asserted." (Emphasis supplied)

In 1933 or thereabouts the Navy adopted a "precisely opposite interpretation" (R. 255). The origins of the present rule are found in a case which arose in the Navy in 1919. C. M. O. 237—1919, p. 22. In that case the Navy requested of Attorney General Palmer his opinion concerning its jurisdiction to try a man, who has reenlisted in the Navy, for an offense committed during a prior enlistment. The Attorney General, relying in part on the Army rulings referred to above, held that there was no jurisdiction. However, he suggested that the Navy "assert the jurisdiction in a proper case in order to obtain, if possible, an authoritative judicial determination of the question." 31 Op. Att'y. Gen. 521.

Thereafter, the Navy continued to adhere to its established ruling that reenlistment does not restore the jurisdiction over offenses committed during a prior enlistment. Laws Relating to the Navy, Ann. (1929 Supp.) p. 179 (reporting a case decided in January, 1922). In 1922 a Federal district court held that an Army court martial had jurisdiction to try a regular Army officer for two alleged offenses committed during his earlier service as a Reserve officer, even on the assumption that there had been an interval of several months between his two services. *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.). One of the offenses was embezzlement, and under the 94th Article of War as under Article 14 of the AGN, jurisdiction over that offense would clearly have survived the discharge from the first service. The other offense, based on the same acts, was Conduct Unbecoming an Officer and a Gentleman. With respect to that offense the Court rested its decision on the wholly untenable ground that it did not matter when the offense occurred, even if the accused were a civilian at the time, since the Army should have the power to dismiss undesirable officers from the service. Apart from its unsound reasoning, the decision on this phase of the *Joly* case was plainly erroneous on the theory of the Circuit Court of Appeals in the present case, since the District Judge failed to accept the administrative rulings of the Army which had been in effect for many years. See page 16, *supra*.

The *Joly* case did not alter the Army rule that reenlistment does not revive jurisdiction over offenses during a prior enlistment. See Manual for Courts-Martial U. S. Army (1928), page 8, §10. However, in 1933 the Navy apparently accepted this decision as the "authoritative judicial determination" referred to by Attorney General Palmer and adopted its present administrative interpretation on the basis of that decision. Section 559, Naval Courts and

Boards (1923 ed.) ft. nt. 30.[6] (See Appendix, p. 35.) The new ruling was followed in C. M. O. 7—1938, p. 42 and presumably in other unreported decisions.

Section 334(a) of Naval Courts and Boards (1937 ed.) merely incorporates in the text of that edition the substantial provisions of footnote 30 of Section 559 of the 1923 edition. (See Appendix, p. 34.)

B. The Long Established Rulings of the Navy Should Be Accepted.

If the administrative rulings of the Navy are used to aid in the construction of the AGN on the theory that the terms of the statute are uncertain, then the long established rulings prior to 1933 should be held to fix the meaning of the statute.

This Court should apply the well-established rule that the long continued practical interpretation of an uncertain statute by the executive department charged with its administration should be given determinative significance in a judicial interpretation of the statute except where clearly erroneous. *United States* v. *Midwest Oil Co.*, 236 U. S. 459; *National Lead Co.* v. *United States*, 252 U. S. 140, 145-146; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *United States* v. *American Trucking Associations*, 310 U. S. 534; *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572.

In *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, the case most often cited for this doctrine, this Court, speaking through Mr. Justice Cardozo, in upholding the power of the Executive to alter tariff schedules

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6. As we have stated, *supra* at page 14, ft. nt. 4, this footnote was added to the 1923 edition of Naval Courts and Boards by a "change" or amendment to the original publication, which was dated subsequently to February 1, 1933. The footnote cited *Ex parte Jolly*, *supra* and an unpublished decision of the Judge Advocate General, adopting the present administrative ruling, G. C. M. No. 75740, dated February 1, 1933.

under the Flexible Tariff Act without granting a hearing to those affected, said at p. 315:

> "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U. S. 760, 763; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machinery Co.* v. *United States*, 282 U. S. 375; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178."

C. The Established Rulings Should Be Followed Since They Were Affirmative Determinations That Jurisdiction Did Not Exist.

Any attempt to distinguish the above decisions on the grounds that the administrative interpretation here involved is of a negative character in the sense that it relates to the absence of authority to act is foreclosed by the recent case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. In that case this Court, following the long standing interpretation of the Federal Trade Commission, rather than its new interpretation designed to extend its jurisdiction, held that the Federal Trade Commission Act did not give that Commission authority to proscribe unfair methods of competition in intra-state sales. This Court stated at pages 351, 352:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not de-

pendent on control over infra-state transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315."

The authority of the *Bunte* case has been consistently recognized. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 578 n. 17; *United States* v. *American Union Transportation Co.*, 327 U. S. 437. In *United States* v. *American Union Transportation Co.*, *supra*, this Court repudiated the long standing practice of the United States Maritime Commission not to assume authority over certain classes of forwarders in foreign commerce and sustained its attempt to assert jurisdiction in this case. But in that case there was a mere administrative failure to assert jurisdiction rather than, as here, an affirmative decision that jurisdiction was not granted. See 327 U. S. at page 455 n. 18. Further, the Court there considered the language, legislative history and policy of the statute as clear indications that the Commission was intended to have the power now asserted. In the language of the Court, at page 455 n. 18:

"The present case, by virtue of differences from that of Bunte Bros. relating to the clarity and definiteness of the statute's terms, the policy of the Act, and the legislative history, is one which falls within the pronouncement: 'Authority actually granted by Congress

of course cannnot evaporate through lack of administrative exercise.' 312 U. S. at 352."

Those cases which are sometimes cited for the proposition that instances of mere non-action are not as a rule given weight as contemporaneous departmental constructions are not controlling in this case. See *Union Stock Yard & Transport Co.* v. *United States*, 308 U. S. 213, 224; *Kansas City Southern* v. *United States*, 252 U. S. 147. In addition to the broad language of the *Bunte* case, *supra*, the nature of construction placed upon the AGN by the Navy fully distinguishes this case from those where mere non-action was involved. Here there is substantially more than the failure to exercise authority. Rather, as was shown above, the Navy Court Martial Orders here involved were positive declarations that the AGN did not confer jurisdiction over Naval personnel in respect of offenses committed in a previous enlistment. The administrative interpretations relied upon by petitioner took the form of considered decisions not to act because of an absence of authority rather than a mere failure to act.

D. The Long Established Rulings Have Been Sanctioned by Congress.

Further factors likewise compel the conclusion that the long established original administrative rulings of the Navy should be followed. During the years in which the Navy interpreted the AGN as not extending the court-martial jurisdiction to offenses committed during prior enlistments, the Congress made no move to change this interpretation by legislative enactment. This must be taken as legislative acquiescence in this interpretation. It is no novel principle that the silence of Congress in the face of

a long-continued departmental practice or statutory construction may be tantamount to legislative consent to such practice or interpretation. *The Pocket Veto Case*, 279 U. S. 655; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.

Congress has not hesitated to annul Naval regulations of which it did not approve. For example, the Executive Order of November 12, 1908, limiting the duty of the Marine Corps to shore stations was annulled by the Act of March 3, 1909, 35 Stat. 773. See 27 Ops. Att'y. Gen. 259.

Indeed, there is more here than legislative silence. As has been shown, the Army has for many years consistently interpreted the substantially similar Articles of War as not granting court-martial jurisdiction over offenses like those here involved. *Supra*, page 16. In 1920 Congress reenacted the Articles of War without including any provision designed to alter this interpretation which existed at that time. Since the Army and Navy interpretations were identical and the statutes on which these interpretations were based were substantially similar in this regard, Congressional reenactment of the Articles of War without change may be taken as an approval of the Navy as well as the Army interpretation. As was stated in *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401, 402:

> "We make this concession because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particular construed, when not plainly erroneous, must be treated as read into the statute."

E. The Recent Administrative Rulings of the Navy Should Be Rejected.

The recent administrative rulings of the Navy, which reversed the long established rulings denying the jurisdiction asserted in this case, should not be accepted as guides to the interpretation of the AGN.

As we have shown, the prior consistent and eminently reasonable interpretation of the AGN by the Navy has the effect of requiring that the greatest weight be given to these interpretations by a court in making a judicial determination. It would follow that the Navy, which formulated and consistently followed that interpretation, was no less bound to respect it than a court of law. Surely it would demand the most substantial grounds and compelling arguments to warrant the judicial affirmation of such a change by the Navy. Such grounds are not here presented.

Least of all does the decision in *Ex parte Joly, supra*, which inspired this change, offer the substantial support required for its justification.

Despite the fact that the District Court in the *Joly* case ignored the long continued administrative rulings of the Army (see *supra* at page 18), and despite the fact that the Army refused to alter its interpretation of the Articles of War after this holding, the Navy accepted this decision as authority for its change in interpretation in situations like the present case. The dubious authority of the *Joly* case makes suspect the changed interpretation which rests upon it. Since the Navy relied upon the *Joly* case its recent rulings cannot be accepted as "evidence of those who must constantly deal with the statute, and whose understanding of it is likely to be right in cases of doubt" (R. 255).

A similar situation confronted this Court in *Kessler* v. *Strecker*, 307 U. S. 22, where the issue was presented

whether the statute providing for deportation of undesirable aliens permitted the deportation of an alien who once had been, but no longer was, a member of the Communist Party. The Justice Department had interpreted the statute as denying this power until certain decisions held to the contrary. Following these decisions the Justice Department reversed itself and attempted to deport such aliens. This Court upheld the earlier interpretation of the statute and pointed out that the later interpretation had apparently been influenced by erroneous judicial decisions. Said the Court at page 33:

> "The only decisions which support the Government's position are those in the Second Circuit. [U. S. ex rel Yokinen v. Comm'r of Immigration (CCA 2d) 57 F. 2d 707; U. S. ex rel Mannisto v. Reimer (CCA 2d) 77 F. 2d 1021.] We cannot approve their reasoning or result. We cannot find that there has been such uniform construction as requires an interpretation of the Act in accordance with that view. The administrative construction seems to have been in favor of the respondent's view until after the decision in the Yokinen case, and the construction seems to have been changed in deference to the decision in that case."

Likewise, in *Social Security Board* v. *Nierotko*, 327 U. S. 358, the Court declined to accept an administrative interpretation because it was based upon certain judicial decisions which the Court considered without merit.

IV

The jurisdiction of the Naval court martial cannot be based upon Section 334(a) of Naval Courts and Boards.

In its first opinion in this case the Circuit Court of Appeals referred to the rule stated in Winthrop's treatise and in the earlier court martial orders denying jurisdiction in cases like the present, and said:

> "These rulings would be conclusive against the jurisdiction of the court-martial in the case at bar, were it not for section 334, Naval Courts and Boards, 1937." (R. 225).

The theory of the Court was that under Section 591 of Title 34 U. S. Code, the Navy is authorized to issue "orders, regulations, and instructions"; that Section 334(a) of Naval Courts and Boards (1937 ed.) is an "instruction" and therefore a "regulation" under Section 591 of Title 34; that petitioner agreed to be bound by all "regulations" of the Navy under his contract of reenlistment; and that petitioner became subject to this "regulation" either by the terms of his enlistment contract or by the act of reenlistment.

We have already shown, *supra*, at pages 14-16, that the Navy has no power to extend its court martial jurisdiction either by regulations under Section 591 of Title 34, U. S. Code, or otherwise. It remains to be demonstrated that the provisions of Section 334(a), Naval Courts and Boards (1937 ed.) do not constitute a "regulation"; that petitioner did not consent to be bound by such provisions in his contract of reenlistment; and that, in any event, petitioner's consent could not confer upon the Naval court martial jurisdiction over the subject matter.

A. The Provisions of Section 334(a) of Naval Courts and Boards Do Not Constitute a Regulation.

Section 591 of Title 34, U. S. Code provides that:

> "The orders, regulations, and instructions issued by the Secretary of the Navy * * * with the approval of the President, shall be recognized as the regulations of the Navy * * * *"

The relevant provisions of Section 334(a) of Naval Courts and Boards (1937 ed.) can in no proper sense be considered a "regulation" of the Navy within the meaning of Section 591 of Title 34. The important sentence of Section 334(a) reads as follows:

> "However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A.G.N."

The very language of these sentences negates its classification as an "instruction" in the sense of a "regulation" or "order". To issue "orders, regulations, and instructions" clearly suggests the laying down of a mandatory pattern of conduct to be followed. These sentences purport to do nothing of the sort. Rather, they are, on their face, a sum-

mary of the one judicial decision on the point, *Ex parte Joly, supra*, and several Navy court martial orders which followed that decision. Especially is it true in a military organization that an order or command must amount to a "positive mandate" to have effect as such. See *Winthrop, Military Law and Precedents* (1920 ed.) p. 574. Certainly when a military organization, which historically is governed internally by directive mandates, elects to use the mild language of a text book summarizing cases, we cannot assume that an "instruction" in the sense of a "regulation" was intended.

The Circuit Court of Appeals concluded that since this language is part of a chapter entitled "Instructions for Courts Martial", it must be an "instruction" in the sense of a mandatory direction (R. 226). The section next preceding Section 334 provides:

> "The status of civilians on duty with or attached to the naval forces of the United States and entering the war zone on board American merchant vessels can only be determined by examination of the decisions of the Federal Courts of the United States, the purport of which decisions it would be difficult to state briefly, as the principles laid down therein were applied to varying facts."

Clearly this provision cannot be regarded as an instruction in the sense of an order or regulation. Nor can the narrative statement in Section 334(a) be so regarded.

B. Petitioner Did Not Consent to Be Bound by Section 334(a) of Naval Courts and Boards and in Any Event Jurisdiction Over the Subject Matter Cannot Be Conferred by Consent.

Having determined that the last sentence of Section 334(a) Naval Courts and Boards (1937 ed.) constituted a "regulation", the majority of the Court below then held that this provision was incorporated by reference in petitioner's contract of reenlistment as part of the "regulations" to which he agreed to be subject (R. 227). The Court pointed out that all persons in the Naval service "so far as the duties of each are concerned" are directed to observe the provisions of Naval Courts and Boards (R. 226). See Naval Courts and Boards, p. vi.

Naval Courts and Boards is primarily a manual for the use of Naval courts martial, courts of inquiry, and boards of investigation. It has never been circulated generally in the Naval service. Only a small perrentage of Naval officers have duties which require a familiarity with its provisions. Only enlisted men in the yeoman branch attached to courts martial or legal staffs would even see this book. Surely a chief signalman, such as petitioner, would neither see Naval Courts and Boards nor understand its contents if he should see it. To call the provisions of this book a part of the contract of enlistment is to indulge in a fiction without any foundation. This is incorporation by reference beyond the limits of any reason or fairness.

Furthermore, even if it could be concluded that petitioner consented to be bound by the provisions of Section 334(a), such consent could not confer upon the Naval court martial jurisdiction over the subject matter where that jurisdiction was not otherwise present. Such jurisdiction cannot be rested upon consent. *See Hormel et al. v. Northern Securities*, 194 U. S. 48; *Grubb v. Public Utilities Commis-*

sion, 281 U. S. 470; *VerMehren* v. *Sirmyer*, 36 F. (2d) 876 (C. C. A. 8). *Cf*: 22 Op. Att'y. Gen. 137. As this Court stated in the *Grubb* case, *supra*, 281 U. S. at page 475:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction over the subject matter must arise by law and not by mere consent."

Finally, the jurisdiction of Naval courts-martial with respect to enlisted personnel should not depend upon the terms of the contract of enlistment. That jurisdiction should be determined by the status of such personnel as members of the Naval service. See *In re Grimley*, 137 U. S. 147, 152.

Those who are drafted into the service do not consent to be bound by the regulations of the Navy in any voluntary sense. Yet they should be, and undoubtedly are, bound by such regulations to the same extent as those who enlist. Moreover, merchant seamen are subject to the Articles of War by the mere fact of service on an Army transport. *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E. D. Va.); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio).

V

Petitioner's honorable discharge at the expiration of his prior enlistment extinguished his liability to Naval courts martial for offenses allegedly committed during that enlistment.

The lower court stated that the honorable discharge of the petitioner did not operate as a "pardon". We have never held it out as such for, prior to his discharge he had not been convicted of any offense. In fact, he had not been accused, arrested nor served with charges. An honorable discharge has been determined by this court to be "a formal, final judgment, passed by the Government upon the entire military record of a soldier, and an authoritative declaration by it, that he had left the service in a state of honor." *United States* v. *Kelly*, 82 U. S. 34; *Ex parte Drainer, supra; In re Fong Chew Chung*, 149 F. (2d) 904; *United States* v. *Landers*, 92 U. S. 77.

Section 334 of Naval Courts and Boards, 1937 ed., states that mere expiration of enlistment does not relieve an enlisted man from his naval obligations. The essential factor that does give relief is the honorable discharge which is, in effect, a judgment. It was not secured through fraud or mistake and is, therefore, unimpeachable.

Presently, there are millions of men who have been discharged from the Navy. The time may not be too far distant when many of these man will be drafted or will reenlist. The AGN has a statute of limitation of two years (34 U. S. C. §1200, Art. 61).

If the decision of the Circuit Court of Appeals is held to be the law, any of these man who are drafted or who reenlist may be tried by a court martial for any offense they may have committed in their prior enlistment although, presently, they cannot be. The statute of limitations would

not be a valid plea in bar, for it could be stated in opposing said plea that the statute was tolled during the man's civilian status and did not begin to run until he returned to the service. Surely no such result was ever contemplated and an honorable discharge was meant to be, just as this Court has stated, "a formal final judgment".

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be reversed.

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APPENDIX

The pertinent provisions of the Articles for the Government of the Navy, other statutes and other material are as follows:

1. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 8 (Second).

> "**Article 8. Persons to whom applicable.** Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—
>
> * * * * *
>
> **Second (Cruelty).** Or [who] is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders; * * * "

2. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 14 (Eleventh).

> "**Eleventh (Trial of offender after discharge).** And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

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1. The offenses described in Article 14 are frauds against the United States and similar crimes. They do not include the alleged offenses of which petitioner was convicted (R. 225).

3. 34 U. S. C. §591.

"**Regulations of Navy; what constitute.** The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner."

4. Naval Courts and Boards (1937 ed.) §334.

"**Same: When jurisdiction over persons terminates.** The jurisdiction of courts-martial over officers, midshipmen, nurses, and enlisted men ordinarily ends when they become regularly separated from the service by acceptance of resignation or discharge. However, a discharge obtained by fraud does not oust the jurisdiction of a court martial. The mere expiration of the period of enlistment of an enlisted man, without the concurrence of any other circumstance whatsoever, does not operate to dissolve his status and does not of itself relieve him of liability to military law for offenses committed during the period of enlistment. Discharge by expiration of enlistment does not take effect, notwithstanding delivery of the discharge certificate, until midnight of the last day of service. Discharge at any other time or for any other cause takes effect on delivery of the certificate. An officer dropped from the rolls by order of the President for absence without leave for three months or more, in accordance with the act of April 2, 1918, can not thereafter be tried by court martial, he having by this act become fully separated from the service and become a civilian.

The general rule is subject to the following exceptions:

(a) If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, while in the naval service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. Except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

* * * * *

5. Naval Courts and Boards (1923 ed.) 559, ft.-nt. (30) [Change No. 7].

"Art. 14, A. G. N. (sec. 92).

Except for offenses provided for in that article, a court martial may not try an individual who has been formally

separated from the Navy and is no longer in the service (31 Op. Atty. Gen. 521; *Ex parte Wilson*, 33 Fed. (2d) 214) unless proceedings were instituted against him while he was in the service (31 Op. Atty. Gen. 521; C. M. O. 26-1917). However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court-martial after separation from the service is specifically authorized by statute (*Ex parte Joly*, 290 Fed. Rep. 858). Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in Art. 14, A. G. N. (G. C. M. Rec. No. 75740, Feb. 1, 1933, and G. C. M. Rec. No. 76425, Apr. 4, 1934)."

6. 34 U. S. C. §181.

"**§181. Length of term; discharge of minors; extension of term during war or emergency and discharge thereafter.**

Hereafter enlistments in the Navy may be for minority or terms of two, three, four, or six years, and all laws now applicable to four-year enlistments shall apply * * * to enlistments for a shorter or longer period * * *

* * * * *

Provided further, that all men whose terms of enlistment are extended in accordance with the provisions of sections 181, 181a, 201a, 692, 692a of this title, section 35a of Title 14, and section 16a of Title 37 shall continue during such extensions to be subject in all respects to the laws and regulations for the government of the Navy * * *."